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No. 86-863 (6)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OTIS R. BOWEN,
Secretary of Health and Human Services,

Petitioner,

v.

KENNETH KIZER,
Director of the California Department of Health Services, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE CALIFORNIA ASSOCIATION OF PUBLIC HOSPITALS AND COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENTS' POSITION

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QUESTION PRESENTED

Whether a federal administrative agency is bound by its own policy even if the policy was not issued pursuant to the publication and rule-making requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552 and 553.

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INTEREST OF AMICI CURIAE

The California Association of Public Hospitals ("CAPH") is a California non-profit corporation, the members of which are public hospitals owned and operated by counties throughout California. The County Supervisors Association of California ("CSAC") is a California non-profit corporation, the members of which include more than 250 county supervisors throughout California.

CAPH and CSAC have requested and obtained the written consent of the parties to file this Amici Curiae Brief in support of Respondents' position, urging affirmance of the Court of Appeals' decision. The letters containing the written consents are on file with the Clerk of this Court.

CAPH and CSAC have a compelling interest in the proceedings in this matter because the counties their members represent provide a substantial portion of the Medicaid (known as "Medi-Cal" in California) inpatient and outpatient hospital services in California. The eligibility of patients for Medicaid benefits, and the amount of Medicaid payments made to the State of California by the Secretary of Health and Human Services ("Secretary"), are key concerns of CAPH and CSAC since substantial county revenues are derived from treating Medicaid patients.

In this Brief, CAPH and CSAC limit their discussion and argument to the administrative law issue of whether the Secretary and other federal administrative agencies must adhere to their own written policy even if the policy was not published in the Federal Register and was not promulgated pursuant to the rule-making requirements of the Administrative Procedure Act ("APA").

FACTS

The parties to this proceeding have adequately set forth the specific facts of this case. CAPH and CSAC therefore address only those additional facts relating to the administration of the Medicaid program; facts

which are important to the appropriate resolution of the issue in question.

The Secretary administers the Medicare (42 U.S.C. § 1395) and Medicaid programs through the Health Care Financing Administration ("HCFA"). Indeed, the Secretary expressly delegated virtually all of his authority under Title XIX of the Social Security Act, 42 U.S.C. § 1396 ("Medicaid Act"), to the HCFA Administrator in November 1977. 42 Fed. Reg. 57351-57352 (November 2, 1977). Thus, for example, it was the HCFA Administrator, not the Secretary, who published notice in the Federal Register of the planned implementation of the Court of Appeals' decision in this case. *See* 52 Fed. Reg. 6615-6616 (March 4, 1987).

In addition to issuing formal regulations, HCFA has issued a variety of administrative staff manuals and instructions, containing Medicare and Medicaid policies, procedures and interpretations that affect the public. 42 C.F.R. § 401.112 [1986]. These internal operating manuals include various Health Insurance Manuals ("HIMs"), which contain Medicare and Medicaid policy "guidelines" relating to the administration of the Medicare and Medicaid programs. For example, HIM-14, the Medicare Carriers Manual, governs a variety of important Medicare coverage issues.[1] *See Bowen v. Michigan Academy of Family Physicians*, ___ U.S. ___, 106 S.Ct. 2133, 2139, n.6 (1986).

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[1] The HIM provisions are not promulgated pursuant to APA rule-making requirements and are not published in the Federal Register. *See, e.g., Linoz v. Heckler*, 800 F.2d 871, 873-874, n.2 (9th Cir. 1986).

The manual involved in this case is HIM-23, the HCFA Regional Office Manual, which, like other HIMs, is intended for the use of HCFA employees in the daily administration of the Medicare and Medicaid programs. In addition to being the practical source of Medicare and Medicaid policy, the manual provisions are considered to be binding on many of the Secretary's administrative adjudicators. *See* 42 C.F.R. § § 405.860 and 405.1829 [1986] and discussion in *Bowen v. Michigan Academy, supra*, 106 S.Ct. at 2139, n.6, in which this Court refers to the binding nature of HIM-14 on Medicare hearing officers.

Moreover, the Manual guidelines are applied by HCFA as a source of Medicaid policy in reviewing state plan amendments, such as that involved here. 45 C.F.R. § 201.3(d) [1986].

SUMMARY OF ARGUMENT

In his brief, the Secretary confuses the rationale for, and the application of, the following three *different* principles of administrative law: (1) that to have the binding effect of law *on the public*, federal agency policy ordinarily must be published in the Federal Register (5 U.S.C. § 552) and/or promulgated pursuant to the rule-making requirements of the APA (5 U.S.C. § 553); (2) that federal agencies are bound by their own policy even if such policy is not issued pursuant to APA requirements and is more generous than that required by statute or regulations; and (3) that generally speaking, a federal agency may not be equitably estopped by the negligent provision of erroneous information to a member of the public.

The first and third principles are simply not applicable to the facts of this case. Rather, only the second principle applies and controls the resolution of the case. Just as a federal agency must follow its own formally-enacted regulations, so, as a matter of administrative law, must it also follow its own "informally" issued policy.

In short, although a provision in an agency manual may not have the force and effect of law and thus may not generally bind *the public* (or perhaps be a basis for equitable estoppel), the agency is required to abide by the provision so long as it is extant. This principle of administrative law fosters the uniform application of agency policy and helps to provide certainty to the daily administration of government agencies.

ARGUMENT

I. Agency Policy Which Is Issued Without Compliance With The APA May Not Be Binding On The Public; However, The Issuing Agency Is Nevertheless Required To Grant The Benefits Of Such Policy To The Public.

In his Brief, the Secretary discusses the publication and rule-making requirements of the APA, 5 U.S.C. § 552 and 5 U.S.C. § 553, in connection with his argument that he is not bound by informally issued, nonpublished agency policy.[2] (Sec.'s Brief at 27-28.)

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[2] For the reasons discussed below, the Court of Appeals did not have to discuss the Secretary's compliance or lack of compliance with these APA requirements to hold that the Secretary was bound by the Manual provision in question.

The simple but appropriate response to the Secretary's contention is that the APA publication and rule-making requirements are intended to benefit the public, not to give an administrative agency the opportunity to establish unpublished policy which it may disobey at its unbridled discretion.

As this Court stated in *Morton v. Ruiz*, 415 U.S. 199 (1974), the APA was adopted to provide that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." Public input is assured by 5 U.S.C. § 553, which gives interested parties notice of agency action and an opportunity to be heard regarding agency policy-making. *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969).[3]

Agency policy which is not enacted pursuant to the minimum requirements of the APA is not afforded the force and effect of law and is thus not binding on the public. *See, e.g., Morton v. Ruiz, supra*, 415 U.S. at 231-235; and *Linoz v. Heckler, supra*, 800 F.2d 871 (9th Cir. 1986).

While not generally binding on the public, agency policy issued without compliance with the APA nevertheless must be followed by the agency itself, so

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[3] The APA publication requirements, 5 U.S.C. § 552, are intended to give agencies an extra incentive to publish the necessary details about their official activities in the Federal Register since no person may be adversely affected by material required to be published in the Federal Register but not so published. *See Morton v. Ruiz, supra*, 415 U.S. at 233, n. 27.

long as the policy remains in effect. *See, e.g., Vitarelli v. Seaton*, 359 U.S. 535 (1959), where this principle of administrative law was applied to a Department of Interior internal "order," which had not been issued as a formal regulation and *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224-225, n. 8 and 9 (D.C. Cir. 1959), where the principle was applied to a "rule" of the Federal Communications Commission which had not been formally promulgated but which the court found to have been established by the agency's usual practice.

The holdings in these cases emanate from the general administrative law tenet that an agency must be vigorously held to the standards by which it professes its actions to be judged, even though such standards might be generous beyond the requirements that otherwise bind the agency. *See Vitarelli v. Seaton, supra*, 359 U.S. at 546-547, *Frankfurter, J.; and Service v. Dulles*, 354 U.S. 363, 388 (1957).

As stated by Judge Robinson, "this precept is rooted in the concept of fair play and in abhorrence of unjust discrimination, [footnote omitted] and its ambit is not limited to rules attaining the status of formal regulations." *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985).

In fact, as a result of this doctrine, the lower courts have not hesitated to require the Secretary and his agents to follow the Secretary's policy even when the policy was not issued pursuant to APA requirements. *See, e.g., Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir. 1981) [Secretary required to follow his own Social Security Ruling] and *Home Health Care, Inc. v. Heckler*, 717 F.2d 587, 591-592 (D.C. Cir. 1983) [Secretary's

agent required to follow provisions of informally issued "Intermediary Letter"].

That an internal policy manual may be non-binding on the public (due to the fact it was not published or promulgated pursuant to APA requirements) but binding on the agency which issued it is illustrated by this Court's holding in *Morton v. Ruiz, supra*. There, a provision of the Bureau of Indian Affairs ("BIA") manual which created a disputed eligibility requirement was deemed *not* to be binding on the public because it was *not* issued pursuant to APA rulemaking requirements. 415 U.S. at 231-235.

Nevertheless, the Court cited and relied on another provision of the very same unpublished manual, a provision which required substantive policies such as the eligibility requirement to be issued pursuant to the APA, to conclude that the eligibility requirement had to be issued pursuant to the APA. 415 U.S. at 235. In short, the Court required BIA to adhere to its own internal manual provisions yet held that the internal manual provisions could not adversely affect members of the public.

This Court re-affirmed the continuing vitality of *Morton v. Ruiz* in *United States v. Caceres*, 440 U.S. 741 (1979), a case on which the Secretary ironically relies.

In *Caceres*, the Court held that the failure of an Internal Revenue Service ("IRS") agent to follow IRS electronic surveillance regulations before recording conversations between a taxpayer and an agent did *not* require suppression of the tape recordings *in a criminal prosecution* of the taxpayer accused of bribing an IRS agent. Despite this conclusion, the Court noted that it did not necessarily follow "as a matter of either logic

or law," that an administrative agency has no duty to obey its own internal rules. 440 U.S. at 752, n. 14. Quoting from *Morton v. Ruiz*, the Court stated that where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures even if such procedures are possibly more rigorous than otherwise would be required. *Id.*

The Court explained its decision not to apply the holding in *Morton v. Ruiz* to the situation in *Caceres* by emphasizing that *Caceres* was a case of criminal prosecution. Thus, unlike *Vitarelli v. Seaton* and other such cases, it did not involve a cause of action for judicial review of administrative agency action under 5 U.S.C. § 706, which empowers a reviewing court to compel, *inter alia*, an agency to follow its own regulations.[4]

The doctrine that an administrative agency must follow its own rules is not limited to procedural rules. It applies with equal force to interpretive rules, *i.e.*, rules which do not have the force of law but represent the agency's view of what the law means.

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[4] In footnote 18 [440 U.S. at 754], the Court in *Caceres* indicated that agencies may not be required, at the risk of invalidation of their action, to follow all of their own rules, citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538 (1970). This unusual conclusion is not applicable here. In *American Farm Lines*, the Court excused strict compliance (thus allowing substantial compliance) with an agency's internal procedural rule in order to afford the agency sufficient discretion to resolve quickly and correctly urgent transportation problems. The Secretary has advanced no urgency or emergency-type excuse for his refusal to abide by the rule in this case.

In this regard, one noted administrative law authority has stated:

> A logical related question is that of the extent to which an agency is bound by its interpretive regulations. Unlike substantive regulations, interpretive regulations do not have the force of law; they represent only the agency's view of what the law means and do not of themselves affect anyone's legal rights and obligations. [Footnote omitted.] But this does not mean that an agency can treat its interpretive regulations as so many paper words. An agency may not be legally bound by interpretive rulings issued in response to requests for advice by interested individuals. A different situation exists when the interpretation is embodied in a formal regulation promulgated under the agency's aegis. The considerations that make nonstatutory procedural regulations binding on the agency apply as well to interpretive regulations. [Footnote omitted.] Here, too, as far as the agency is concerned, there may be legal effect without statutory authority.

Schwartz, *Administrative Law*, Little, Brown & Co. (2d Ed., 1984) 165-66.

In *Justice v. Board of Education*, 351 F. Supp. 1252 (S.D.N.Y. 1972), the court compelled the Secretary of Agriculture to comply with his own interpretive regulation which required him to apply certain criteria concerning reimbursement for school lunches to all schools under the jurisdiction of a school authority. The court did so even though the Department of

Agriculture had decided that the rules applied only to the individual schools in the district that elected to participate. *Cf. Port of Jacksonville v. U.S. Coast Guard*, 788 F.2d 705, 708-709 (11th Cir. 1986), which holds that an agency is bound to follow its own internal interpretive rule only if a member of the public will be substantially prejudiced if the agency is permitted to disavow its rule.[5]

II. To Assure Uniform Application Of Agency Policy And To Avoid Agency Havoc, Agencies Must Be Required To Follow Their Own Rules Even If Such Rules Have Not Been Enacted Pursuant To The APA.

Relying heavily upon Judge Kozinski's dissenting opinion concerning the Secretary's Petition for *En Banc* review by the Court of Appeals, the Secretary contends that requiring agencies to follow their own internal rules will "wreak havoc on federal agencies," by making formally-enacted regulations subject to contradiction, revision or repeal by far less formal pronouncements made by "lower-level employees." This contention misperceives the nature of the Medicare and Medicaid manuals and the rationale for requiring administrative agencies to follow their own rules.[6]

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[5] The State and the intervenors in this action have demonstrated the substantial prejudice which will result to them if the Secretary is permitted to disavow the Manual provision in question.

[6] Most respectfully, regarding the merits of the underlying issue, Judge Kozinski apparently confuses the legal effect of an internal rule on the *public* with the effect on the *agency* which issued it. In

The Manual in question, HIM-23, was adopted by HCFA, the very same agency which has adopted other manuals relating to Medicare and Medicaid. For example, another HIM issued by HCFA is HIM-15-I, known as the Medicare Provider Reimbursement Manual.

The Secretary routinely requests reviewing courts to defer to his interpretations contained in the Provider Reimbursement Manual. In fact, he often argues that such interpretations are binding on a reviewing court. In turn, reviewing courts have recognized that provisions of the Provider Reimbursement Manual are entitled "to be given important significance." *See, e.g., Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 325, n. 16 (5th Cir.), *cert. denied*, 469 U.S. 823 (1984). Indeed, this Court in *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 64 (1984), recognized that one of the sources of the Secretary's policy with which a private party was *obligated* to familiarize itself was the Provider Reimbursement Manual.

The Secretary should not be permitted in some cases to argue that his Manual provisions essentially bind reviewing courts and affected members of the public while in other cases, such as this case, to disavow such Manual provisions when he retroactively deems them not to state his present interpretation of the law.

Flores v. Bowen, 790 F.2d 740 (9th Cir. 1986), Judge Kozinski correctly determined that an internal agency rule, which was inconsistent with a formal regulation, could not be applied adversely to a *private party*. However, for the reasons discussed throughout this Brief, it does not necessarily follow that benefits recognized by such an internal rule may be ignored by the agency which issued it.

As indicated in the preceding section, the requirement that agencies must follow their own rules is rooted in the concept of fair play and "in abhorrence of unjust discrimination." *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d at 711. Internal agency guidelines such as those contained in the Manuals are intended to provide uniformity and fairness in connection with agency decision-making.

Manual provisions are issued after consideration and review of the issues by the agency charged with implementing the statutory scheme. It is inappropriate, as a policy matter, to have employees at the regional level second guessing whether manual provisions are consistent with statute and regulation. Such individualized determinations will inevitably result in uneven application of the manual provisions, as different employees reach different results regarding the propriety of the manual provisions under the statute.

Those agency officials and employees who administer federal programs on a day-by-day basis will be in a better position to administer important federal programs in a uniform and non-arbitrary fashion if they know they must adhere to their own Manual provisions and other internal guidelines. If agency officials and employees are permitted to ignore these guidelines, ad hoc decision-making will necessarily occur with resulting arbitrariness. *Cf. Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950-951 (D.C. Cir. 1986), in which the Court indicated that ad hoc departures from agency rules may not be sanctioned because "therein lie the seeds of destruction of the orderliness and predictability which are the hallmark of lawful administrative action."

Knowing that they are required to abide by their internal rules, agencies will take care that such internal guidelines are consistent with the controlling agency statutes and regulations. If the agencies' enabling statute or formal regulations change, the manual provisions and guidelines may be easily revised. If those agency officials and employees who are responsible for the day-by-day administration of a federal program cannot rely on internal rules and guidelines for fear that they may not accurately reflect the agency's current interpretation of the law, either no agency decision-making will result or the decision-making which does result will be non-uniform and arbitrary.

III. Cases Involving Equitable Estoppel Are Not Applicable To This Matter.

The primary case relied upon by the Secretary to support his asserted right to ignore his own internal rules is *Schweiker v. Hansen*, 450 U.S. 785 (1981). (Secretary's Brief at 25-27, 31.) The Secretary's reliance on *Schweiker v. Hansen* is misplaced because that case involved the issue of whether the federal government may be subject to the doctrine of equitable estoppel.

As stated by the Court, the question presented in *Hansen* was whether a government employee's "erroneous statement and neglect of the [Social Security] Claims Manual estop petitioner, the Secretary of Health and Human Services, from denying retroactive benefits to respondent for a period in which she was eligible for benefits but had not filed a written application." *Id.* at 786.

Equitable estoppel is not an issue in this case and thus the rationale for applying or not applying it is not relevant. In *Lyng v. Payne*, ___ U.S. ___, 106 S.Ct. 2333, 2340 (1986), the Court distinguished the equitable estoppel principle from causes of action under 5 U.S.C. § 706, the cause of action in question in this case.

To the extent *Hansen's* rationale is relevant, it must be analyzed in context. In its summary reversal of the lower court, this Court in *Schweiker v. Hansen* stated that the provisions of the Social Security Claims Manual did not bind the Social Security Administration. However, in making this statement, the Court relied upon the holding in *United States v. Caceres*, *supra*. *Schweiker v. Hansen*, *supra*, 450 U.S. at 789-790. As discussed above, *Caceres* confirms the general principle that an administrative agency is required to obey its own rules. As further stated above, the reason the Court did not set aside the agency action in *Caceres* was that the case involved a criminal prosecution rather than an action for judicial review under the APA.

CONCLUSION

Based on the foregoing, the Court is respectfully requested to hold that the Secretary is required to follow his own manual provision in this case, even though such rule was not published and promulgated pursuant to the provisions of the APA. Based on this holding, the Court is requested to affirm the decision

of the United States Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

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WEISSBURG AND ARONSON, INC.
Attorneys for Amici Curiae,
California Association of
Public Hospitals and County
Supervisors Association of California

July 17, 1987

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on July 17, 1987, I served the within *Brief For Amici Curiae The California Association of Public Hospitals and The County Supervisors Association of California in Support of Respondents' Position* in said action or proceeding by depositing 3 true copies thereof, for each addressee, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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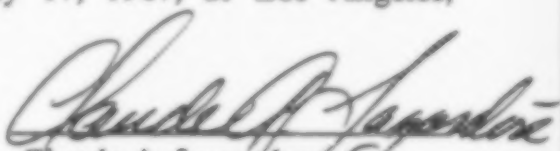
I declare under penalty of perjury that the foregoing is true and correct. Executed on July 17, 1987, at Los Angeles, California.



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